No. 94-325

(6)

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES
October Term 1994

CHANDRIS INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

- against -

ANTONIOS LATSIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE THE CITY OF NEW YORK

The primary issue before the Court in this case is whether the definition of "seaman" for purposes of the Jones Act, 46 U.S.C. § 688, includes employees who are not part of the regular crew of a vessel but have some sort of connection to the work it performs. This question concerns the City of New York, which, with 576 miles of waterfront and 146 square miles of navigable water, is engaged in maritime employment in one of the world's busiest ports. The Staten Island Ferry transports 62,000 passengers a weekday on 5 ferries; the Police Department Harbor Unit operates 21 police launches; the Fire Department Marine Division operates 3 fireboats; the Department of Environmental Protection operates 11 vessels ranging from 24-foot survey vessels to a 324-foot sludge tanker; and other vessels are operated by the Department of

Parks, the Department of Sanitation and the Department of Corrections.

The City of New York also owns vessels that do not employ seamen, such as a prison barge housing 800 inmates, floating cranes and other construction platforms, 100 garbage scows, and spare backup vessels. In addition, police and fire emergency service units deploy rowboats, inflatable boats and jet-skis for shoreside water rescue. The majority of City employees assigned to the maritime agencies do not generally work aboard the City's vessels; rather, they are landbased maritime workers who assist in the overall operation of vessels.

Here, the Court is being asked to address the definition of seaman status in the context of a supervising engineer who travels occasionally on vessels in a fleet of cruise ships. Of course, the job performed by a supervising engineer on an ocean-going passenger ship is easily

distinguishable from the work performed by the City's brown-water maritime workers, whether ferry workers, harbor police or sludge tankermen. However, the test formulated by this Court for seaman status will apply to all maritime workers who seek compensation under the Jones Act.

The City is critically interested in the formulation of a test that will determine that only those maritime workers regularly assigned as members of the crew will be considered seamen for Jones Act purposes. The City of New York submits that (1) the question of whether a worker is covered by a federal law (Jones Act) is a threshold question of subject matter jurisdiction answerable as a matter of law[1]; and (2) the Court of Appeals failed to

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[1] Federal Rule of Civil Procedure 12(b) provides a procedure for resolving subject matter jurisdiction questions in a motion to dismiss. The test for Jones Act seaman status is a jurisdictional question that should be no more difficult to resolve by the court than a challenged domicile in a (continued...)

establish a predictable test here. Accordingly, the City urges this Court to reverse the decision of the Second Circuit, although perhaps on grounds other than those raised by the parties in their arguments before this Court.

Since the test for seaman status does not rely on an interpretation of legislative intent or public policy goals indicating a preference for Jones Act coverage over other compensation statutes, the test should be reliable, predictable, and outcome neutral. The City proposes a simple test for seaman status that looks to the staffing requirements of the vessel to determine who is a regular member of the crew and therefore entitled to Jones Act protection. The answer to who is a member of the crew can

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[1] (...continued)
diversity case. While issues of liability and damages must be resolved on a case by case basis, the issue of which compensation statute covers workplace injuries for maritime workers must be more predictable simply because workers performing the same job should be covered by the same law.

be found in the ship's log, which will show who is permanently assigned to the vessel.

STATEMENT OF THE CASE AND BACKGROUND

In McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991), the Court stated that seaman status evolves from a "definite or permanent" employment connection to a vessel in navigation. Id. at 355. While the nature of the connection was not fully defined, the Court held "that a necessary element of the connection is that a seaman perform the work of a vessel". Id. In the instant case, the Second Circuit Court of Appeals ruled that the test for seaman status required a "more or less permanent" connection. 20 F.3d 45. In comparison, the Fifth Circuit Court of Appeals' test for seaman status requires a permanent assignment or performance of a "substantial part of his work on the vessel." The Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). However,

whether on the basis of a "more or less permanent" test or a "substantial portion" test, both Circuits concluded that a maritime worker who spends a small percentage of his overall work-time on a vessel could be a seaman. Compare, Latsis, supra, 20 F.3d at 54 (less than 10%) and Easley v. Southern Shipbuilding, 965 F.2d 1, 5 (5th Cir. 1992) (maritime worker with 11-1/2% worktime on a vessel is not a seaman, but "percentage of a worker's time on a vessel in navigation is [not] the sole or determinative factor in the search for seaman status"); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (maritime worker performing 20-30% of his work on a vessel is not a seaman).

ARGUMENT

THE SECOND CIRCUIT ERRED IN FINDING SEAMAN STATUS WHERE A LANDBASED ENGINEER WAS NOT A REGULAR MEMBER OF THE CREW. A PREDICTABLE TEST FOR SEAMAN STATUS IS NEEDED THAT CAN BE RESOLVED BY RULE 12(b) PROCEDURE AS A JURISDICTIONAL QUESTION.

Maritime workers include all those whose employment brings them within a federal or state court's admiralty jurisdiction.[2] Maritime law distinguishes between landbased maritime workers and seamen to determine

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[2] Admiralty jurisdiction is present when an accident occurs upon navigable waters involving a maritime activity. Workman v. New York City, 179 U.S. 552 (1900); McDonald v. City of New York, 36 F.2d 714 (2d Cir. 1929). A maritime tort cause of action can be brought in federal court or in state court under the savings to suitors clause. Jurisdiction for maritime injuries occurring on land derives from various federal statutes. E.g., Jones Act; Longshore and Harbor Workers' Compensation Act, 33 U.S. C. § § 901 et seq.; Admiralty Extension Act of 1948, 46 U.S.C. § 740 (extends admiralty jurisdiction to injuries on land caused by a vessel). See, Heim v. City of New York, 442 F.Supp. 35 (E.D.N.Y. 1977)

whether the Jones Act or some other worker's compensation statute, whether federal or state, provides benefits in the event of a workplace injury.

The Jones Act itself does not define the term "seaman": that definition is found in the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq.; Wilander, 498 U.S. at 347 ("Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute").[3]

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[3] The source of Jones Act coverage also gives rise to certain "odd but true" anomalies when applied to the City of New York. First, the Jones Act gives seamen the same rights as railroad workers under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 et seq. FELA covers only railway workers engaged in interstate commerce. Felton v. Southeastern Pennsylvania Transportation Authority, 952 F.2d 59, 66 (3d Cir. 1991). Thus a city subway worker engaged in work on intrastate railway has no rights under FELA, yet a Staten Island Ferry crew member receives a railway worker's rights through the Jones Act. Second, even though the definition of seaman is found in the LHWCA, the LHWCA by its terms does not cover states and their political subdivisions. 33 U.S.C. § 903(b). Thus, landbased maritime workers employed by the (continued...)

One factor distinguishes a landbased maritime worker from a seaman: the connection to a ship. "The key to seaman status is employment-related connection to a vessel in navigation". Wilander, supra, 498 U.S. at 355. Seamen include "[a]ll who work at sea in the service of a ship". Id. at 354. Seamen "owe allegiance to a vessel at sea." Id. at 347. Seamen work "on board" a vessel. Id. at 346.

The Jones Act status test does not require that a seaman perform "seaman's duties". "It is not the employee's particular job that is determinative, but the employee's connection to a vessel." Wilander, supra, 498 U.S. at 354. For example, the duties that seamen perform include cook, chambermaid, waiter and bartender. Id. at 345.

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[3] (...continued)
City who are not members of the crew receive worker's compensation under state law. O'Brien v. City of New York, 822 F.Supp. 943 (E.D.N.Y 1993).

However, just like regular members of the crew, landbased maritime workers can perform the work of a vessel. Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991). This is because any task performed on a vessel is in some way in furtherance of the vessel's mission, whether the work is done by a landbased maritime worker who makes repairs or unloads cargo, or a member of the crew who is regularly engaged in the vessel's transportation function. See, Bach v. Trident Steamship Co., 947 F.2d 1290 (5th Cir. 1991) (harbor pilot who navigates an ocean-going vessel into port performs the work of a vessel, yet has been found not to be a Jones Act seaman); Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991) (same); McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) (maintenance worker painting the mainmast of a museum vessel was not a seaman); Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 39 (2d Cir.

1982) (ship repairmen injured or killed while working on a ship on the high seas were landbased maritime workers); Marroquin v. American Trading Transportation Co., Inc., 711 F.Supp. 1165 (E.D.N.Y. 1988) (ship's "riding crew" cleaning the cargo tank on a vessel sailing on the high seas were harbor workers). Thus, case law supports the conclusion that a landbased worker may be called upon to perform work which a seaman might perform and not be covered by the Jones Act.

When Wilander "jettison[ed] the aid in navigation language" from the test of Jones Act seaman status, 498 U.S. at 353, the approach that labels certain tasks as "seaman's duties" fell aside as well. Wilander rejected a definition of "seamen's duties" that required seamen to "hand, reef and steer", referring to a 19th Century test of seaman status. 498 U.S. at 343. Thus, the Second Circuit erred when it relied on the fact that plaintiff, as a

supervising engineer, was doing "traditional seaman's duties." 20 F.3d at 56. An analysis of seaman status based on the task performed on vessels is simply not consistent with this Court's discussion in Wilander. Whether the plaintiff in Latsis had the past experience of a traditional seaman is irrelevant to the determination of whether he is a present member of the crew. Plaintiff's current employment status, not his job title as marine engineer, should determine what compensation statute applies. Gizoni, supra, 502 U.S. at ___, 112 S. Ct. 486, 492.

A. The Latsis "More or Less Permanent" Connection to a Vessel Test for Seaman Status is Unworkable.

We submit that the Second Circuit Court of Appeals was incorrect when it held that maritime workers who spend only 10% of their time on board can be seamen. 20 F.3d at 54. The central error in Latsis is that the court focused on the purpose of the maritime worker's presence

on the vessel at the time of injury to find seaman status, rather than determining whether a maritime worker's overall assignment to the vessel was as a member of the crew of the vessel in its regular operation.

The Second Circuit's "more or less permanent connection" test for seaman status will prove unworkable.[4] Even the terminology "more or less" is ill-suited to precise legal definition, particularly when applied to occasional seamen. While the Circuit states that the test is not a "temporal concept," it requires a connection "more than temporary or transitory". 20 F.3d at 57. The Circuit defined the employment-related contribution in terms of (a)"duration" and (b)"nature". Id. The duration prong considers the "number and frequency of similar

[4] The Second Circuit's "more or less permanent" connection test originates in Salgado v. M.J. Rudolph Corp., 514 F.2d 750 (2d Cir. 1975), where the maritime worker seeking seaman status was found to be a landbased harbor worker, not a Jones Act seaman.

contributions," while the "nature" prong may include the "amount of time and effort spent ashore preparing" the vessel. In addition, the connection must "regularly expose plaintiff to the hazards of sea."[5] Id.

Despite the stated requirement of a "permanent" connection, the Circuit Court ruled that a maritime worker

[5] The "hazards of the sea" are endured by the regular crew of a vessel, who face both the mundane and the unpredictable conditions on board a vessel. Seaman status does not depend on whether the vessel was moored in calm water or riding out a hurricane in blue water when the injury occurred. Despite the Circuit's requirement that a plaintiff be "regularly expose[d] . . . to the hazards of the sea", there is no requirement that the injury itself be caused by the hazards of the sea to be compensable under the Jones Act.

Landbased maritime workers also face dangerous conditions at work. Victory Carriers, Inc. v. Law, 404 U.S. 202, 208 n.1 (1971); Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 756 (2d Cir. 1975) ("stevedoring is one of the most dangerous occupations"). Theoretically, a compensation system could be devised that increased benefits based on the degree of workplace hazards. However, the hazards of the workplace is not a criterion used by the courts when determining which compensation statute applies.

who works less than 10% of his time aboard a vessel in navigation could be a seaman. 20 F.3d at 54. The court stated that such a broad test for seaman status is required so as not to frustrate the policy of the Jones Act. Id. at 55. Yet the court completely ignored the fact that maritime workers are covered by other compensation laws with precisely the same policy goals as the Jones Act. Nor is the Court's definition of a Jones Act seaman supported by legislative intent, identified public policy goals or based on an analysis which prefers one compensation scheme to another.[6]

The Second Circuit Court of Appeals in Latsis v. Chandris, Inc. relied on United States District Judge I. Leo Glasser's analysis in Buccellato v. City of New York, 808 F. Supp. 967 (E.D.N.Y. 1992), in which the court denied

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[6] Without policy goals to guide the choice between alternative compensation statutes, a predictable test for coverage will at least enable an employer to accurately gauge its liability for workplace injuries.

the City's summary judgment motion on the issue of seaman status in ten "related" cases arising from unrelated workplace injuries brought by workers performing the same job. 20 F.3d at 53; 808 F.Supp. at 970 n.1.

The City argued in Buccellato that sanitation workers assigned to the barge unloading operation at Fresh Kills Landfill ("the digger gang") were not seamen because they never traveled aboard the barges while transporting garbage across New York Harbor. 808 F.Supp. at 971. Members of the digger gang go on barges to clean, handle lines and to perform other duties while the barges are tied along the dock. Id. at 969-70. Digger gang workers are positioned on the light (unloaded) and heavy (loaded) barges when the vessels are shifted by land-powered lines and cables along the dock during the unloading operation. Id. at 969-70. At all times during the shifting operation the barges remain connected to land by lines.

In formulating its test for seaman status, the Second Circuit approved of the analysis of the test in Buccellato that left to the jury the question of whether a worker at the water's edge, who assists vessel unloading operations but never goes to sea on a ship, is a seaman rather than a landbased maritime worker. The related cases continue in discovery with separate trials expected next year.

The City contends that Buccellato was wrongly decided.[7] Under the current test, in Buccellato, ten separate

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[7] The City's contentions on seaman status have been raised in state as well as in the federal courts, but have not yet been reviewed by either the Circuit Court of Appeals or the New York Court of Appeals. Fallon v. City of New York, 1994 WL 75164 (S.D.N.Y. 3/8/94) (n.o.r.) (ferry deckhand assigned to the terminal not a seaman); O'Brien v. City of New York, 182 A.D.2d 744, 582 N.Y.S.2d 763 (2d Dept. 1992) (ferry terminal supervisor not a seaman even though part of his duties took him aboard the ferries); see also, O'Brien v. City of New York, 822 F.Supp. 943 (E.D.N.Y. 1993) (second attempt to seek damages under LHWCA barred on res judicata and other grounds). The City's summary judgment motion challenging the seaman status of a dock builder was denied in Tramutola v. City of New York, CV-91-3570(CBA) (E.D.N.Y.) and decision (continued...)

juries will decide whether each worker is covered under the Jones Act; it is likely that some digger gang workers will obtain jury verdicts finding seaman status and others will not.

In another case brought by a City sanitation worker injured while working in the digger gang, the issue of seaman status was tried to verdict. The jury's verdict that plaintiff was not a seaman was sustained in Leotis v. City of New York, 818 F. Supp. 63 (S.D.N.Y. 1993). While this jury verdict has no collateral effect on the other digger gang cases, it would be inconsistent and unfair if one worker was granted coverage under a worker's compensation statute while a co-worker doing the same job was denied those same statutory rights because a jury viewed the situation differently.

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[7] (...continued)
following a bench trial of the seaman status issue is pending.

The fact that the Second Circuit relied on Buccellato in its analysis in the instant case fairly predicts that the Circuit's test, if affirmed, will continue the practice of routinely leaving to a jury the resolution of seaman status of maritime workers only marginally connected to a vessel. There will be no assurance that maritime workers performing the same job will receive the same coverage under the statute.

B. The Test for Seaman Status Proposed by the City of New York as Amicus Curiae to Resolve the Issues Presented by the Second Circuit's Decision in This Case.

It is the City's position that the term "seaman" should be simply defined as a regular member of the crew assigned to a vessel in navigation. Application of this definition depends, in turn, on (1) identification of what is a "vessel" for Jones Act purposes, and then (2)

identification of those workers which constitute its regular crew.

To do the ship's work, and thereby be a member of the crew, a maritime worker must be aboard the vessel while it is engaged in transportation across navigable waters. A maritime worker must "voyage" on a vessel to be a seaman. The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916) ("[E]very one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when [the ship] is upon a voyage"). The City submits that when the ship leaves the dock to start its voyage, the seaman is a permanently assigned member of the regular crew.

1. What is a Jones Act Vessel?

A "vessel" for purposes of the Jones Act is a commercial floating structure whose primary purpose is the transportation of passengers, material or cargo across

navigable waters. Hatch v. Durocher Dock and Dredge Inc. 33 F.3d 545 (6th Cir. 1994). The transportation function of the vessel distinguishes the Jones Act vessel from other vessels. Vessels without an assigned crew, even if engaged in transportation, logically are not Jones Act vessels. Thus, Jones Act vessels do not include unmanned barges, such as garbage scows, because other than the tug crews that move these barges across navigable waters, no maritime worker is assigned as a member of the crew when it is engaged in transportation.

Also excluded are vessels such as construction platforms that are capable of navigation, but whose primary purpose is not navigation. Hatch, id. (derrick barge); DiGiovanni v. Traylor Bros. Inc., 959 F. 2d 1119, 1123 (1st Cir. 1992) (same); Tonnesen v. Yonkers Contracting Co., 847 F.Supp. 12 (E.D.N.Y. 1994) (same); McCarthy

v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) (museum ship).

Similarly, vessels undergoing substantial repair or out of service are not Jones Act vessels. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Kathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir 1992); McClendon v. OMI Offshore Marine Service, 807 F.Supp. 1266 (E.D. Texas 1992) (purported seaman injured in the galley of a tow-boat in drydock while cooking a potato laced with mercury during an alchemy experiment).

2. Who is a Regular Member of the Vessel's Crew?

If the floating structure qualifies as a Jones Act vessel, the court should then determine whether the plaintiff is a regularly assigned member of the crew of the vessel. Only a member of the regular crew can establish the required connection to a vessel in navigation to be a Jones

Act seaman.[8] The first step in identifying the members of the regular crew is a look at the ship's roster or operating logs. See, Roth v. U.S.S. Great Lakes Fleet, Inc., 25 F.3d 707 (8th Cir. 1994) ("list of the crews . . . adds to the conclusion that he was not a member - as his name does not appear on [the] list"). J.S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910) (bartender's name in "ship's time-book satisfied [the court] that he was in fact" employed as a seaman). Contemporaneous time records are a predictable indication of whether the employee has a permanent assignment on the vessel.

Vessels regularly engaged in commerce have regular crews. For example, a New York City 52-foot police patrol launch has a crew consisting of pilot, navigator and engineer; the crew of a Staten Island Ferry consists of a

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[8] Seaman status only determines which law applies; without an indication of legislative preference for coverage under one compensation statute over another, the test for coverage under the Jones Act should be outcome-neutral.

captain, an assistant captain, a chief engineer, a mate, deckhands and oilers. The people regularly assigned to work on these vessels are the crew of the vessel. Workers who occasionally go out on these vessels do not lose their landbased employment status.

The plaintiff in Latsis was a landbased supervisor and not a regularly assigned engineer. The Second Circuit had no difficulty determining that the Chandris vessels "depending on size, carried between 12 and 14 licensed engineers on board". The operation of the vessel did not require plaintiff's presence on board. 20 F.3d at 48. Clearly his employer did not permanently assign him to the vessel for the future. See, Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1252 (3d Cir. 1994).

The definition of "member of the crew" should be limited to the personnel assigned to the vessel when it performs its regular missions. The inquiry should shift from

defining "seaman" in terms of a plaintiff's work experience to identifying the regular crew of the Jones Act vessel. To insure predictability, the test should exclude substitute crew members and occasional voyagers. When an employee divides his work between landbased and vessel-based duties, the predominant nature of his job should control whether he is considered a seaman or a harbor worker.[9] The maritime employee should be covered as a seaman or a landbased worker, not both. A look at the ship's log will generally end the inquiry.

Finally, the situs of the activity engaged in at the time of the accident has no relevance to the status test. A worker entitled to coverage under the Jones Act is covered for any injury while he is in the service of the vessel. His

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[9] When there are no disputed material facts, the question of seaman status can be resolved on a Fed. R. Civ. P. 12(b) motion without a hearing. Compare, Buccellato, 808 F.Supp. at 970 (although material facts are not in dispute, question of seaman status left for jury determination).

employment status controls what statute applies, whatever his various duties on the vessel and ashore. The fact that an accident happened on board a ship, on the gangway, or on the dock has no effect on the outcome of the seaman status test. Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959). Thus, dicta in Latsis suggesting as much must be abandoned. 20 F.3d at 56 ("[W]e express no opinion as to whether Latsis would have been covered had he been injured while the vessel was in drydock"). See also, DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119, 1123 (1st Cir. 1992) (workers assigned to floating crane barge "are to be considered seamen only when it is actual navigation or transit").

Employees of the City of New York regularly assigned as members of the crew have long been held to be covered by the Jones Act. See, Jacob v. New York City, 315 U.S. 752 (1942) (full-time maritime oiler aboard a

Staten Island ferry); Oxley v. City of New York, 923 F.2d 22 (2d Cir. 1991) (full-time pilot on police launch); Bailey v. City of New York, 55 F. Supp. 699 (E.D.N.Y. 1944), affd, 153 F.2d 427 (2d Cir. 1946) (ferry engineer assigned to engine room); Pariser v. City of New York, 146 F.2d 431 (2d Cir. 1945) (dredge worker). Temporary or substitute crew members and dockside workers who prepare the vessel for voyage are not seamen. Fallon v. City of New York, (see n.7, infra); Wolbert v. City of New York, 314 F.Supp. 528 (E.D.N.Y. 1970) (deckhand assigned to ferry terminal injured while assisting tie-up of a ferry was not a seaman). Also excluded from Jones Act coverage are maritime workers who board to inspect vessels. O'Brien v. City of New York, supra, 182 A.D.2d at 744.

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Landbased maritime workers who go onto vessels perform virtually any function on the vessel that can be

performed by a member of the crew. A seaman is distinguished from a landbased maritime worker by being a regular member of the crew. A simple test that requires, for purposes of the Jones Act, that the vessel be primarily engaged in commercial navigation and that a seaman must be a regular assigned member of the crew, as defined by the ship's log, is preferable to the unfathomable confusion generated by hundreds of court decisions that try to answer the simple question: "what is a seaman?"[10]

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[10] A recent Westlaw search in the maritime cases database (since 1945) of the terms "Jones Act" and "seaman status" lists 454 cases.

CONCLUSION

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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